CASE NO. 13-20-00280-CR

IN THE THIRTEENTH COURT OF APPEALS
CORPUS CHRISTI, TEXAS

ELIJAH TATES, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

ON APPEAL FROM THE 85TH DISTRICT COURT
BRAZOS COUNTY, TEXAS
CAUSE NO. 16-05720-CRF-85

STATE'S BRIEF

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ORAL ARGUMENT REQUESTED

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TRIAL COURT:	Hon. Kyle Hawthorne Presiding Judge, 85th District Court Brazos County, Texas

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STATE'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

COMES NOW, the State of Texas, by and through its District Attorney, and files this brief in response to the two points of error alleged by Appellant, and would respectfully show the Court the following:

STATEMENT REGARDING ORAL ARGUMENT

The State requests oral argument.

STATEMENT OF THE CASE

Appellant, Elijah Tates, was charged by indictment with Evading Arrest or Detention with a Prior Conviction. (3 RR 10), (CR 4). The indictment contained two punishment enhancement paragraphs, elevating the charge to a second-degree

felony. (CR 4). Appellant's trial began on January 28, 2020. (3 RR 10). Appellant pled "not guilty." (*Id.*). Prior to closing argument, Appellant requested a jury instruction pertaining to Tex. Code Crim. Proc. art. 38.23. (4 RR 4-12), (CR 56-57). The trial court denied that request. (4 RR 12). On January 29, 2020, the jury found Appellant guilty of Evading Arrest or Detention with a Prior Conviction. (4 RR 41). Appellant elected to have the trial court assess his punishment. (CR 58). On April 7, 2020, the trial court held Appellant's punishment hearing. (5 RR 9). Appellant pled "not true" to the indictment's two punishment enhancement paragraphs. (*Id.*). At the conclusion of the punishment hearing, the trial court found both enhancement paragraphs to be true and assessed Appellant's punishment at confinement in the IDTDCJ for 5 years. (5 RR 97). On April 29, 2020, Appellant filed Notice of Appeal. (CR 121).

STATEMENT OF FACTS

State's Evidence During the Guilt-Innocence Phase

Liam Stewart testified that, on September 29, 2016, he was working as a patrol officer for the Bryan Police Department. (3 RR 15). Stewart was engaged in "proactive enforcement" near the intersection of Peppertree and Forestwood in Bryan. (3 RR 16, 18). Stewart described the area as a high-crime area, and he was seeking to "suppress" crime by spending as much time in the area as possible. (3 RR 16-17).

Stewart was performing stop-sign enforcement on a commonly-run stop-sign at the intersection of Peppertree and Forestwood. (3 RR 18). Stewart was driving a marked police car. (3 RR 22-23).

Stewart observed a white Honda drive down Peppertree and stop at the stop sign at Forestwood. (3 RR 19). Stewart noticed the Honda's driver stare at him, which aroused Stewart's suspicion. (*Id.*). The white Honda turned onto Forestwood and then quickly turned onto Verde street. (*Id.*). When the Honda turned onto Verde, it failed to use a turn signal, which is a traffic violation. (3 RR 19, 20). Stewart began following the car, accelerating quickly to catch up to the Honda. (3 RR 19). Stewart observed the Honda stop in the middle of the roadway and then signal a left turn into a large apartment complex. (3 RR 19, 22, 41). In doing so, the driver of the Honda committed a traffic violation by failing to signal a turn at least 100 feet before turning. (*Id.*). As the Honda pulled into the apartment complex parking lot, Stewart activated his police car's emergency lights, and briefly its siren, in order to pull the Honda over. (3 RR 22-23).

The Honda stopped in a parking space and the driver, whom Stewart identified to be Appellant, jumped out of the car and fled on foot. (3 RR 23, 30). Appellant ran through the apartment complex and jumped over a six-foot fence. (3 RR 23). Stewart chased Appellant and was able to apprehend him. (3 RR 23, 25).

Abigail Belangeri testified that she is the custodian of records for the Brazos County Jail. (3 RR 49). Belangeri provided jail book-in records for Appellant, showing his birthdate and other identifying information. (3 RR 51, 53). Belangeri is also the custodian of recordings of phone calls made by inmates from the jail. (3 RR 54). Through Belangeri, prosecutors admitted State's Exhibit 7, a recording of a phone call made by Appellant following his arrest. (3 RR 55), (6 RR 13). In that call, a woman asked Appellant, "Why did you run?" Appellant replied, "I had shit on me." (3 RR 56), (6 RR 13).

Finally, prosecutors admitted State's Exhibit 11, a certified judgment of conviction from 2007 for the offense of Evading Arrest, and State's Exhibit 12, a written stipulation that Appellant is the same individual named in State's Exhibit 11. (3 RR 56-58), (6 RR 14, 15).

Appellant's Evidence During the Guilt-Innocence Phase

Appellant testified and acknowledged that he evaded from Officer Stewart. (3 RR 65). Appellant ran from Stewart because he was in possession of marijuana. (3 RR 77-78). However, Appellant claimed that, contrary to Officer Stewart's testimony, he had signaled his turn from Forestwood onto Verde. (3 RR 62, 63, 84). Additionally, Appellant testified that he signaled his turn from Verde into the apartment complex at least 250 feet prior to turning. (3 RR 64, 84). Appellant denied

committing any traffic violations. (3 RR 66). Appellant claimed that Officer Stewart lied when testifying about the two traffic violations he observed. (3 RR 66, 84, 85).

State's Evidence During the Punishment Phase

Abigail Belangeri testified that, in her capacity as records-custodian for the Brazos County Jail, she also keeps fingerprints of inmates, including Appellant. (5 RR 16-18). Additionally, Belangeri testified to Appellant's identifying information, including his date of birth and his State ID ("SID") number. (5 RR 19).

Rebecca Wendt testified that she is a fingerprint analyst for the Bryan Police Department. (5 RR 26-27). Wendt compared known fingerprints from Appellant to prints contained on State's Exhibits P2 through P13. (5 RR 27-41). By matching Appellant's fingerprints and other identifying information, Wendt identified Appellant as the same person named in State's Exhibits P2 through P13. (5 RR 27-41). Through Wendt, prosecutors admitted the following judgments of conviction:

- State's Exhibit P2: Possession of a Controlled Substance 1-4g; (6 RR 17-20); Manufacture/Delivery of a Controlled Substance 1-4g; (6 RR 21-24);
- State's Exhibit P3: Assault – Family Violence – Enhanced; (6 RR 25-30);
- State's Exhibit P4: Theft; (6 RR 31-33);
- State's Exhibit P5: Judgment Revoking Theft probation; (5 RR 41-42), (6 RR 34-36);
- State's Exhibit P6: Tampering w/ Government Record; (6 RR 37);
- State's Exhibit P7: Failure to ID Fugitive; (6 RR 38);
- State's Exhibit P8: Failure to ID Fugitive; (6 RR 39);
- State's Exhibit P9: Poss. of Controlled Substance < 1g; (6 RR 40-42);

- State's Exhibit P10: Judgment Revoking probation for Poss. of Controlled Substance < 1g; (6 RR 43);
- State's Exhibit P11: Judgment Revoking probation for Poss. of Controlled Substance < 1g; (6 RR 44-46);
- State's Exhibit P12: Theft; (6 RR 47);
- State's Exhibit P13: Assault; (6 RR 48).

(5 RR 41-42).

Melinda Fox testified that she is an officer with the Bryan Police Department. (5 RR 43). In February of 2006, Fox responded when Appellant assaulted his ex-girlfriend. (5 RR 44-48). Fox observed the victim to have numerous injuries. (5 RR 45).

Stephen Schoellman testified that he is an officer with the College Station Police Department. (5 RR 55). In June of 2009, Schoellman responded to a welfare concern call involving a child. (5 RR 55-56). While there, he spoke to Appellant's ex-girlfriend and noticed that she had injuries. (5 RR 57). Schoellman took a report from the woman and filed Assault charges against Appellant. (5 RR 57-59).

Appellant's Evidence During the Punishment Phase

Appellant testified that he works as an electrician. (5 RR 60). He also talked about how he had been in jail since the conclusion of the guilt-innocence phase of his trial. (5 RR 61). Appellant described how he suffered a heart attack while in jail in 2018. (*Id.*). Appellant said he is a "changed person." (*Id.*). Appellant testified that he is trying to better himself and is worried about his own health, and the health of his grandmother. (5 RR 63). Appellant said that, without him, she does not have

anyone to take care of her. (5 RR 69). Appellant discussed being the father of four adult children. (5 RR 64). Appellant claimed he could succeed on probation if given the opportunity by the judge. (5 RR 64-65). Appellant also claimed during his punishment-phase testimony that he ran from Officer Stewart because "there was a lot of polices [sic] killing innocent black people." (5 RR 66-67).

SUMMARY OF THE ARGUMENT

In the first point of error, Appellant claims that the trial court committed error by denying Appellant a jury instruction pursuant to Article 38.23 of the Texas Code of Criminal Procedure. Appellant further claims that he was harmed by the trial court's failure to give the Article 38.23 instruction.

The State responds that Appellant was not entitled to an Article 38.23 instruction because Appellant's actions in evading detention constituted an independent criminal offense which occurred after the disputed traffic stop. Furthermore, if the trial court did err in denying Appellant an Article 38.23 instruction, such error was harmless because, even without that instruction, the jury could not have convicted Appellant without first finding beyond a reasonable doubt that the officer's attempt to detain Appellant was lawful.

In his second point of error, Appellant claims that appearing for his punishment hearing by video conference violated his rights under the United States and Texas Constitutions to be present for his trial. Appellant further claims that he

was not required to preserve error on this issue.

The State responds that, because Appellant failed to object to appearing for his punishment hearing by video conference, Appellant has not preserved this issue for appeal. Moreover, because Appellant appeared via video conferencing, was able to watch and hear all of the State's witnesses, as well as being able to testify himself, Appellant was present. Finally, any error in having Appellant appear via video conference was harmless.

STATE'S RESPONSE TO POINT OF ERROR NO. 1

Appellant was not entitled to an Article 38.23 instruction because Appellant's actions in evading detention constituted an independent criminal offense which occurred after the disputed traffic stop. Furthermore, if the trial court did err in denying Appellant an Article 38.23 instruction, such error was harmless.

Standard of Review

Reviewing a claim of a jury charge error requires a two-step process. The first issue is determining whether any error exists. Second, if error does exist, the court must determine whether it resulted in sufficient harm to warrant reversal. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009).

In conducting a harm analysis, courts consider the degree of harm in light of the entire jury charge, the state of the evidence, the arguments of counsel, and all other relevant information revealed by the record as a whole. *Ellison v. State*, 86 S.W.3d 226, 228 (Tex. Crim. App. 2002).

Reversal is appropriate only if an appellant suffered actual harm, rather than merely theoretical harm from a jury charge error. *Arline v. State*, 721 S.W.2d 348, 351 (Tex. Crim. App. 1986).

In appellate cases which are transferred from one court of appeals to another, the court to which the case is transferred must decide the case in accordance with the precedent of the transferring court. Tex. R. App. P. 41.3.

Applicable Law

A person commits the offense of Evading Arrest or Detention if he intentionally flees from a person he knows is a peace officer attempting to lawfully arrest or detain him. Tex. Penal Code §38.04(a).

Before making a traffic stop, an officer must have reasonable suspicion that some crime was, or is about to be, committed. *Kelly v. State*, 413 S.W.3d 164, 169 (Tex. App. – Beaumont 2013, no pet.). When an officer observes a driver commit a traffic offense, reasonable suspicion exists to justify stopping the driver. *Id.* at 170.

The driver of a motor vehicle must use a turn signal to indicate an intention to turn. Tex. Transp. Code §545.104(a). A driver must signal a turn continuously for at least 100 feet before the turn. Tex. Transp. Code §545.104(b).

Article 38.23(a) of the Texas Code of Criminal Procedure states:

> *No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.*

> *In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.*

Tex. Code Crim. Proc. art. 38.23(a).

Relevant Facts

Officer Liam Stewart testified that he saw Appellant commit the traffic violation of failing to signal a turn. (3 RR 19, 20). Officer Stewart then saw Appellant stop in the middle of the roadway before signaling an immediate left turn into a large apartment complex. (3 RR 19, 22, 41). In doing so, Appellant committed a second traffic violation of failing to signal a turn at least 100 feet before turning. (*Id.*). Stewart activated his police car's emergency lights, and briefly its siren, in order to pull Appellant over. (3 RR 22-23).

Appellant stopped in a parking space, jumped out of his car, and fled from Officer Stewart on foot. (3 RR 23, 30). Appellant ran through the apartment complex and jumped over a six-foot fence. (3 RR 23). Officer Stewart chased Appellant and was able to apprehend him. (3 RR 23, 25).

Appellant testified and acknowledged that he evaded from Officer Stewart. (3 RR 65). Appellant ran from Stewart because he was in possession of marijuana. (3 RR 77-78). However, Appellant claimed that, contrary to Officer Stewart's testimony, he had signaled both turns in a timely fashion. (3 RR 62, 63, 64, 84).

Appellant denied committing any traffic violations. (3 RR 66). Appellant claimed that Officer Stewart lied when testifying about the two traffic violations he observed. (3 RR 66, 84, 85).

At trial, Appellant's counsel focused his efforts entirely on contesting the lawfulness of Officer Stewart's attempt to detain Appellant. Trial counsel's opening statement, his cross-examination of Officer Stewart, Appellant's testimony, and counsel's closing argument all focused exclusively on raising a reasonable doubt that the detention was lawful. (3 RR 13-14, 31-40, 43-44, 59-88), (4 RR 27-36).

Discussion

Article 38.23 Instruction

Appellant was not entitled to an Article 38.23 jury instruction because the offense for which he was convicted, Evading Arrest or Detention, occurred after the disputed traffic violations, and constituted an independent criminal offense. Additionally, the very issue contained in an Article 38.23 instruction was already a legal element of the offense which the jury had to consider.

Appellant cites no authority directly supporting his argument that, in an Evading Arrest or Detention trial, a defendant who disputes the basis for a traffic stop is entitled to an Article 38.23 jury instruction.

On the other hand, in *Biscamp v. State*, the Tenth Court of Appeals specifically addressed whether Article 38.23's exclusionary rule applies in an Evading Arrest or

Detention case where a defendant disputes the traffic violation used to justify the detention. No. 10-17-00358, 2019 Tex. App. LEXIS 1463 *1 (Tex. App. – Waco Feb. 27, 2019, no pet.). Concluding that art. 38.23 does not apply, the Tenth Court of Appeals noted the following:

> *…the offense [of evading] had not occurred before the challenged action of the detention for speeding. [The defendant] fleeing the scene constituted an independent criminal offense committed after the detention for speeding.*

Id. at *8.

Appellant relies on the United States Supreme Court's ruling in *Wong Sun v. United States*, 371 U.S. 471 (1963), to support his argument that evidence of evasion from an unlawful traffic stop constitutes "fruit of the poisonous tree." (Appellant's Brief, pp. 3-4). *Wong Sun* was a narcotics case involving warrantless arrests and searches which were not supported by probable cause. *Id.* at 474-77. Appellant contends that because his evasion was "linked" to Officer Stewart's attempt to make a traffic stop, then the exclusionary rule should apply. (Appellant's Brief, p. 4).

However, in *Biscamp*, the Tenth Court of Appeals pointed out that "the exclusionary rule does not provide limitless protection to one who chooses to *react* illegally to an unlawful act by a state agent." *Biscamp v. State*, 2019 Tex. App. LEXIS 1463 at *8, *citing Iduarte v. State*, 268 S.W.3d 544 (Tex. Crim. App. 2008). (emphasis added). The court went on to say that "evidence is not classified as fruit [of the poisonous tree] requiring exclusion merely because it would not have

happened 'but for' the primary violation." *Biscamp v. State*, 2019 Tex. App. LEXIS 1463 at *8. Unlike in *Wong Sun*, the criminal action for which Appellant was convicted constituted an independent illegal choice, which Appellant made *after* any alleged misconduct by the officer. Thus, the principles outlined in *Biscamp* and *Iduarte* govern Appellant's case.

Additionally, the Texas Court of Criminal Appeals addressed a related issue in *Woods v. State*, 153 S.W.3d 413 (Tex. Crim. App. 2005). Like Appellant, the defendant in *Woods* was charged with Evading Arrest or Detention. *Id.* at 413. Woods claimed that the officer had no legal basis to detain him and consequently sought to suppress the evidence against him pursuant to art. 38.23. *Id.* at 414-15. The Court of Criminal Appeals ruled that Woods was not entitled to a hearing on his motion to suppress because the lawfulness of the detention was already an element of the crime. *Id.* at 415-16. The Court stated:

> *…by asking the trial judge to suppress the arrest, and the details of [the defendant's] flight and evasion of the detention by [the officer], [the defendant] was in effect asking the trial judge for a ruling on whether the prosecution had proof of an element of the offense.*

Id. at 415.

Similarly, an Article 38.23 instruction in Appellant's case would have amounted to nothing more than a request for jurors to decide an issue which they were already required to decide as an element of the charged offense.

Thus, because Appellant's evasion of Officer Stewart amounted to an

independent criminal act that occurred after any disputed traffic violation, and because an Article 38.23 instruction would merely have asked jurors to consider an issue which was already before them, Appellant was not entitled to that instruction.

Harm Analysis

Even if the trial court erred in denying Appellant an Article 38.23 instruction, such error was harmless.

Appellant claims that he was deprived of the "opportunity to specifically argue the factually disputed stop could not be used as a basis for the detention of [Appellant's vehicle]." (Appellant's Brief, p. 5). On the contrary, Appellant's trial counsel forcefully argued that very thing:

> *There is only one issue in this case. There's only one issue and that issue is was the police officer attempting to lawfully arrest or detain the defendant…Look at that video…when you look at it again and again, you will see that blinker is on in both instances, I believe…And when you start thinking about the officer and his credibility, and the credibility of his testimony, that's what you're looking at in whether he was out here just looking to stop someone. Anyone he saw. A black man in a car and he stopped him for no reason or attempted to stop him for no reason.*
>
> *…*
>
> *The State has not proved that this is a valid stop or valid attempt at detention.*
>
> *…*
>
> *[The officer] was looking to go in there and he took a leap and he made an invalid traffic stop.*
>
> *…*

This charge tells you that the officer must have a valid reason to start with…and if he doesn't – you don't have that valid reason to start with, then you don't have a reason to stop him.

…

My position is that it was not lawful. He committed no traffic violations and had given no reason for a stop and [the officer] didn't know who he was other than he was a black person…And when you have no reason to detain him, the State has failed to meet that burden of proof; they've failed to meet that burden of proof on that element.

…

When he's not being detained lawfully, then your duty as jurors is to say no; is to say not guilty.

…

The State has not met their burden of proof beyond a reasonable doubt on that one element…and for that reason, your duty as jurors is to acquit Elijah Tates in this case.

(4 RR 28-36).

In *Porter v. State*, the Tenth Court of Appeals ruled that the denial of an Article 38.23 instruction in an Evading Arrest or Detention case, if erroneous, was harmless[1]. 255 S.W.3d 234, 242 (Tex. App. – Waco 2008, pet. ref'd). In *Porter*, the court noted that the jury was instructed that it could only convict if it found that the defendant fled from a peace officer who was attempting to lawfully detain him. *Id.* "Thus," the Court said, "in finding [the defendant] guilty of evading arrest or

[1] In his brief, Appellant dismisses *Biscamp* as "an unpublished case – without precedential value – decided by the Tenth Court of Appeals." (Appellant's Brief, p. 1). However, Rule 41.3 of the Texas Rules of Appellate Procedure requires this Court to rule in accordance with the Tenth Court of Appeals' precedent, including *Biscamp* and the published opinion in *Porter*. Tex. R. App. P. 41.3.

detention, the jury necessarily found that the arrest or detention of [the defendant] was lawful." *Id. See also Druery v. State*, 225 S.W.3d 491, 505 (Tex. Crim. App. 2007) (holding that "when a refused charge is adequately covered by the charge given, no harm is shown.").

As in *Porter*, the jury in Appellant's case was instructed:

> *Now, if you find from the evidence beyond a reasonable doubt that on or about 29th day of September, 2016, in Brazos County, Texas, the defendant, ELIJAH TATES, did intentionally flee from L. Stewart, a person the defendant knew was a peace officer who was attempting to lawfully arrest or detain the defendant, and that prior to the commission of the charged offense, on the 241h day of January, 2007, in cause number, 04-04300-CRM-85 in the 851h District Court of Brazos County, Texas, the defendant was convicted of the offense of Evading Arrest or Detention, then you will find the defendant guilty of the offense of Evading Arrest or Detention with a Previous Conviction as charged in the indictment.*
>
> …
>
> *The prosecution has the burden of proving the defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.*

(CR 2-3, 4). (emphasis added).

Therefore, Appellant's jury could not have convicted him without first finding that Officer Stewart's attempt to detain Appellant was lawful. Thus, the jury resolved the very issue that an Article 38.23 instruction would have addressed, rendering harmless any error in failing to give that instruction.

Because Appellant was not entitled to an Article 38.23 jury instruction, and

because, even if he was entitled to it, its denial was harmless, Appellant's first point of error is without merit and should be overruled.

STATE'S RESPONSE TO POINT OF ERROR NO. 2

Appellant failed to object to appearing for his punishment hearing by video conference, thereby failing to preserve this issue for appeal. Because he appeared by video conferencing, as required by court order, Appellant was present for his punishment hearing. Additionally, any error in Appellant appearing via video conference was harmless.

Standard of Review

Constitutional errors are harmless if the court concludes beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. P. 44.2(a). *See also Hayes v. State*, 516 S.W.3d 649, 656 (Tex. App. – Houston [1st Dist.] 2017, pet. ref'd).

Errors related to a defendant's right to be present are reviewed under the "reasonably substantial relationship" test. *Id.* Under that test, the defendant's presence must bear a reasonably substantial relationship to his opportunity to defend in order to be harmful. *Id.* at 657.

Applicable Law

The Confrontation Clause of the Sixth Amendment creates a constitutional right to be physically present at trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

In all prosecutions for felonies, the defendant must be personally present at the trial. Tex. Code Crim. Proc. art. 33.03.

A trial court has an independent duty to secure a defendant's presence in court for his trial unless the defendant has waived his appearance. *Hayes v. State*, 516 S.W.3d 649, 656 (Tex. App. – Houston [1st Dist.] 2017, pet. ref'd). A failure of defense counsel to request a defendant's appearance does not forfeit the defendant's right to be present. *Id.*

Violations of the right to be present are subject to harmless error analysis. *Routier v. State*, 112 S.W.3d 554, 577 (Tex. Crim. App. 2003).

Relevant Facts

Appellant was tried and convicted by a jury in January of 2020. (3 RR 1 – 90), (4 RR 1 – 43). Appellant was physically present for the guilt phase of his trial. (3 RR 10, 11). Following Appellant's conviction, the trial court increased Appellant's bond. (4 RR 48).

In March of 2020, the COVID-19 global pandemic forced Texas courts to cease all in-person court activities. Specifically, on March 13th, the Texas Supreme Court and Court of Criminal Appeals issued the following joint order:

> *(2) Subject only to constitutional limitations, all courts in Texas may, in any case, civil or criminal – and must to avoid risk to court staff, parties, attorneys, jurors, and the public – without a participant's consent:*
>
> *…*
>
> *(b) Allow or require anyone involved in any hearing, deposition, or other proceeding of any kind – including but not limited to a party, attorney,*

> *witness, or court reporter, but not including a juror – to participate remotely, such as by teleconferencing, videoconferencing, or other means;*
>
> Tex. Sup. Court, *First Emergency Order Regarding the Covid-19 State of Disaster*, Misc. Docket No. 20-9042, p. 1 (March 13, 2020), found at https://www.txcourts.gov/media/1447321/209042.pdf. [2]

That order was in place through May 8, 2020. *Id.* at p. 2. On April 7, 2020, the trial court held Appellant's punishment hearing. (5 RR 1). At the time, Appellant was incarcerated in the Brazos County Jail. (5 RR 7). Due to the COVID-19 pandemic, the participants in the hearing, including Appellant, the prosecutors, and all witnesses, appeared via "Zoom" video conference and the proceedings were live-streamed to the public on YouTube. (5 RR 6-8). Appellant's trial counsel, while physically present in the courtroom, also participated in the video conference. (5 RR 6-7, 15).

Prior to the beginning of the hearing, Appellant and his trial counsel requested to consult via video conference in a "private room." (5 RR 6-7). The trial court indicated that he would facilitate the private discussion. (5 RR 7). Nothing in the record indicates that Appellant and his lawyer were not able to talk in a private setting.

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[2] Pursuant to Rule 201 of the Texas Rules of Evidence, the State requests the Court to take judicial notice that, when Appellant's punishment hearing occurred on April 7, 2020, the trial court was subject to the Texas Supreme Court's and Court of Criminal Appeals' joint *First Emergency Order Regarding the Covid-19 State of Disaster. See Kirby v. State*, No. 01-07-00444-CR, 2008 Tex. App. LEXIS 5776, at *8 n. 5 (Tex. App.—Houston [1st Dist.] July 31, 2008, no pet.) (noting that appellate courts have the discretion to take judicial notice of facts outside the record.).

During the hearing, the State called four witnesses. (5 RR 16-60). Additionally, prosecutors presented evidence of Appellant's 11 prior criminal convictions, as well as multiple prior probation revocations. (5 RR 41-42), (6 RR 16-48).

Appellant also testified. (5 RR 60). Indeed, as Appellant acknowledges in his brief, his testimony was, by far, the longest and most in-depth testimony offered during the punishment phase. (Appellant's Brief, p. 12), (5 RR 60-92).

Discussion

Appellant was present for the entirety of his trial, including the punishment phase, during which he appeared by video-conference. At no time was Appellant denied the ability to see or hear evidence or testimony, nor was Appellant denied or restricted from presenting evidence himself.

COVID-19 Global Pandemic

In March of 2020, the COVID-19 global pandemic forced courts throughout the State of Texas, including Brazos County, to cease conducting in-person court activities. Consequently, when Appellant's punishment phase occurred on April 7, 2020, the prosecutors, each of the State's witnesses, and Appellant, all appeared via "Zoom" video conferencing. (5 RR 6-8). Appellant did not object to appearing via Zoom for his punishment hearing. (*Id.*).

Presence in Court

While the 2020 COVID-19 global pandemic has created this issue of first impression on what it means to be "present" in court, guidance can be found in the Court of Criminal Appeals' analysis in *Garcia v. State*, 149 S.W.3d 135 (Tex. Crim. App. 2004). In *Garcia*, the Court considered the trial of a non-English-speaking defendant who was not provided with an interpreter. *Id.* at 136-138. The Court viewed the issue through the lens of a defendant's right to be present in court. *Id.* at 140.

The Court noted that a critical feature of the right to be present in court is "the right to understand the testimony of witnesses." *Id.* Similarly, in *Hayes v. State*, the court observed, "If a defendant does not understand the proceedings taking place, it is as if he is not even present." 516 S.W.3d at 655.

In Appellant's case, the record is clear that Appellant was able to understand everything that was happening. Additionally, the record indicates that Appellant had the ability, if needed, to consult with his counsel in a private video conference, and that he did so on one occasion. (5 RR 6-7). Furthermore, Appellant was able to testify fully. During his testimony, Appellant explained:

- His background; (5 RR 60);
- His occupation; (5 RR 60, 67-68);
- His health problems; (5 RR 61-63, 88-89);
- His family, and his role within it; (5 RR 63-64, 69, 89);
- His perspective on the charged offense; (5 RR 65-67);

- His hope to receive probation; (5 RR 71-73, 89);
- His assurances that he is rehabilitated; (5 RR 63, 64, 73, 87-88).

Appellant also acknowledged his extensive criminal history and his multiple failures on previous probations. (5 RR 63, 73, 86, 87-88).

At one point during Appellant's punishment hearing, the following exchange occurred:

Trial Court:	*Well, hold on a second. My court reporter disappeared.*
Prosecutor:	*I also don't see [defense counsel] anymore.*
Trial Court:	*Anybody have a problem with either myself not being on camera or [the court reporter] not being shown taking the – on the Zoom meeting as being present taking the record? [Defense counsel] is here and can see her in the courtroom.*
Defense Counsel:	*I have no objection.*
Trial Court:	*Anybody else?*
Prosecutor:	*No, Judge, I think that's fine.*

(5 RR 15).

From that exchange, this Court can infer that the trial court, who was the trier of fact in punishment, could visually see everyone else involved in the hearing, including Appellant. Thus, not only could the trial court hear Appellant's testimony, he could watch Appellant as well.

Sixth Amendment and Video

While Texas appellate courts have not yet addressed the issue of whether video conferencing satisfies a criminal defendant's Sixth Amendment right to appear for trial, guidance is available through the courts' resolution of a similar Sixth

Amendment issue: the right to confront witnesses. Numerous Texas courts have ruled that a defendant's right to confront a witness is satisfied when the witness appears via video conference. *See Cervantes v. State*, 594 S.W.3d 667, 671 (Tex. App. – Waco 2019, no pet.) (holding that a video system allowing contemporaneous transmission and cross-examination satisfied the defendant's right to confront); *see also Molina v. State*, No. 01-17-00075-CR, 2018 Tex. App. LEXIS 4827 at *8 (Tex. App. – Houston [1st Dist.] June 28, 2018, pet. ref'd) (holding that electronic testimony of a witness did not violate defendant's right to confront).

In Appellant's case, he complains that appearing via video conference violated his rights under the Sixth Amendment because, when he testified, he was deprived of the "nuance and physical presence" that in-person testimony would have afforded him. (Appellant's Brief, pp. 12-13).

In *Cervantes*, the court addressed many of Appellant's concerns about how video conferencing relates to witness testimony and the Sixth Amendment. Cervantes was charged with Indecency with a Child. *Cervantes*, 594 S.W.3d at 667. The victim of an extraneous offense was permitted to testify to the jury via "Skype" video conferencing because she lived out of state and was unable to travel. *Id.* at 670. The court found significance in the following features of the video system:

- Contemporaneous transmission;
- Contemporaneous cross examination;
- The defendant could see the witness;
- The witness could see the defendant;

- The trier of fact would be able to see the witness and observe her demeanor.

Id. See also Acevedo v. State, No. 05-08-00839-CR, 2009 Tex. App. LEXIS 8109 (Tex. App. – Dallas Oct. 20, 2009, pet. ref'd) (stating that the right to a physical face-to-face meeting is not absolute and must give way in certain circumstances where "considerations of public policy and necessities of the case" so dictate; *quoting Maryland v. Craig*, 497 U.S. 836, 845-46 (1990)).

Because of those features, the appellate court ruled that the video system was an appropriate means of protecting the defendant's Sixth Amendment rights under the "exceptional circumstance" in which the witness could not appear in person. *Cervantes,* 594 S.W.3d at 671. By any measure, the circumstances that courts face in light of 2020's COVID-19 pandemic are "exceptional."

As the Texas Supreme Court and Court of Criminal Appeals stated in their order of March 13, 2020, courts must "allow or require" anyone involved in a case, including a defendant, to appear through video conferencing in order to "avoid risk to court staff, parties, attorneys,…and the public," even over objections. In Appellant's case, the trial court ensured that Appellant was present for his punishment hearing, despite the challenges posed by the COVID-19 pandemic.

An illustration of how Texas courts consider the issue of whether a party is "present" in court can be found in *In the Interest of D.C.*, No. 04-04-00928-CV, 2005 Tex. App. LEXIS 5807 (Tex. App. – San Antonio July 27, 2005, pet. ref'd). The

case dealt with the termination of a parent's rights to his child. *Id.* at *3. The parent participated in the trial via video conference. *Id.* at fn 2. The parent complained that participating through video conference deprived him of constitutional protections. *Id.* The appellate court, however, noted that the parent participated in the hearing and had the opportunity to address the court and voice any objections. *Id.* Moreover, the court noted that the parent did not preserve the issue for appeal because he did not object to appearing via video conference. *Id.*

In Appellant's case, the trial court arranged for Appellant to appear for his punishment hearing in a manner that allowed him to:

- Hear all testimony at the time it was given;
- See all witnesses as they testified;
- See all evidence as it was offered;
- Give testimony;
- Object to testimony or evidence;
- Contemporaneously cross examine all witnesses;
- Have the trier of fact hear and observe Appellant's testimony, including his demeanor, as he was testifying;
- Consult with his counsel in a private setting if necessary.

Thus, given the exceptional circumstances under which Appellant's punishment hearing occurred, the trial protected and preserved Appellant's right to be present for that hearing.

Moreover, Appellant did not object to appearing for his punishment hearing by video conference. While a criminal defendant does not waive his right to be present at trial by failing to object, Appellant *was* personally present as required by

art. 33.03, but he failed to object to *the manner* in which he was present. Thus, he has not preserved that issue on appeal.

Harm Analysis

Even if the trial court erred in allowing Appellant to appear for his punishment hearing over video conference, such error was harmless because it did not further his defense.

In *Hayes v. State*, the court conducted a harm analysis where the defendant was in jail and not present in court for part of his punishment hearing, including when his co-defendant gave testimony against him. 516 S.W.3d at 652, 656-57.

The court noted that, while Tex. R. App. P. 44.2(a) presumes harm from a constitutional error, such error is harmless if the court finds beyond a reasonable doubt that the error did not contribute to the conviction or punishment. *Hayes*, 516 S.W.3d at 657. Despite the fact that Hayes was absent from court for part of his punishment hearing, the court found that the error was harmless. *Id.* at 658. In making its ruling, the court stated the following:

> *We cannot envision how [the defendant's] presence could have furthered his defense, because there is no evidence that [the defendant] had any information not available to the attorneys or the court regarding any of the matters discussed at the [hearing]. The trial court had before it…[the defendant's] version of the events of [the offense]…[The defendant] points to nothing that he could have presented that was not already in evidence…*

Id. (emphasis added).

Unlike the defendant in *Hayes*, Appellant was able to see and hear all testimony and evidence given in his punishment hearing. Furthermore, Appellant was able to testify without limitation or restriction. In light of evidence showing that Appellant had nearly a dozen prior criminal convictions, including at least five felonies, and the fact that Appellant received a sentence of only five out of a possible 20 years, Appellant can point to nothing indicating that his appearance on video contributed to his punishment. Thus, any error in requiring Appellant to appear via video conference was harmless.

Consequently, Appellant's second point of error is without merit and should be overruled.

PRAYER

Wherefore, premises considered, the State of Texas respectfully prays that the judgment of the trial court be in all things affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing State's Brief was emailed to Lane Thibodeaux, Attorney for Appellant, at lanet1@msn.com on this the 28th day of October, 2020.

/s/ Ryan Calvert

Ryan Calvert
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4

I do hereby certify that the foregoing document has a word count of 6068 based on the word count program in Word for Microsoft Office 365.

/s/ Ryan Calvert

Ryan Calvert
Assistant District Attorney

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